IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 19.08.2006

Coram

The Honourable Mr. JUSTICE K.MOHAN RAM

Civil Miscellaneous Appeal No.1269 of 1999

M/s. Bhawerlal Sons
No.20, Strotten Muthiah Street
Chennai - 600 079. .... Appellant/Applicant

Vs.

The Union of India
Owning Southern Railway
Represented by its
General manager, Chennai. .... Respondent/Respondent

Appeal against the judgement and decree, dated 24.02.1999, passed by majority opinion of the Judges, Railway Claims Tribunal, Chennai Bench in O.C.No.97 000191.

For Appellant : Mr. T.Rajamohan.

For Respondent : Mr. R.Gunasekaran, for
Mr. V.G.Sureshkumar.

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J U D G M E N T

This Civil Miscellaneous Appeal has been filed challenging the order dated 24.02.1999 passed in OA I/191/97 on the file of the Railway Claims Tribunal, Chennai bench.

2. The short facts leading to the filing of the above C.M.A. are set out below:-

(i) On 26.08.1996, 495 bags of Green Peas were booked by the claimant through the Railways from Wadibandhar (Northern Railway) to Royapuram-Chennai (Southern Railway). According to the claimant/appellant herein, the usual course of transit time is only 15 days, but the consignment did not reach the destination for a long period of time. Hence, the claimant preferred a claim for non-delivery on 05.02.1997 under Ex.A-1. Ultimately, the consignment was received at the destination point of Royapuram on 14.04.1997, after a delay of 8 months and 10 days in a highly damaged condition. The claimant sought for open delivery on 15.04.1997 under Ex.A-3 and open delivery was granted on 18.04.1997 under Ex.A-8. The assessment of damage, as stated in the joint survey report-Ex.A-8, is as follows:-

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(a) 150 bags each weighing 50 kilos assessed at 95%.

(b) 69 bags each weighing 50 kilos assessed at 90%.

(c) 276 bags each weighing 50 kilos assessed only at 15%.

(ii) Thereafter, the claimant took delivery of the consignment on 21.04.1997 and arranged for re-weighment on 21.04.1997 under Exs.A-10 and A-11. As far as the low assessment of damage of 15% is concerned, the claimant arranged for a private survey on 21.04.1997 at the Royapuram Goods Shed itself before taking delivery of the goods and the private surveyor inspected the goods on 24.04.1997 also at the claimant's godown. The samples taken by the private surveyor were sent for analysis and Exs.A-13 and A-14 are the analysis reports and the survey report is Ex.A-12. As per the analysis reports and survey report, the samples of Green Peas sent for analysis were found to be affected by yeast/molds, which made them poisonous and unfit for human consumption.

(iii) According to the claimant/appellant herein, the total value of the consignment is Rs.4,25,622/- and the damaged goods were sold as cattle feed for a sum of Rs.73,145/- under Exs.A-17 to A-19 and after giving credit to the said amount, the loss for the claimant was assessed at Rs.3,52,477/-. On the above said pleadings the claimant filed OAI/191/97 under Section 106 of the Railways Act claiming a sum of Rs.4,25,622/-. The said claim of the claimant was resisted by the Railways by filing a reply statement.

3. In the reply statement it was contended that the consignment was carried to destination with due care and caution; the consignment was not entrusted in sound condition for carriage; the consignment was carried to destination in a thorough water-tight wagon with due care and caution and reasonable foresight and there was no negligence or misconduct on the part of the respondent and the alleged damage is due to loading of already damaged stuff by the sender at the forwarding station and inherent vice of the commodity for which the respondent is not liable. It was further contended by the respondent that the consignment was delivered to the consignee at his request without prejudice to the Railways liability under law and the alleged re-weighment done by the third party / private surveyor is not binding on Railways after assessment delivery made and delivery effected.

4. Before the tribunal, on the side of the claimant, the claimant was examined as A.W.1 and the private surveyor was examined as A.W.2 and Exs.A-1 to A-23 were marked. On the side of the respondent-Railways, no witness was examined, but Exs.B-1 to B-3 were marked. On a consideration of the oral and documentary evidence adduced before the tribunal, the tribunal held that the respondent-Railways failed to show that the damage was due to loading of already damaged stuff by the sender at the forwarding station and inherent vice of the commodity. The tribunal further

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held that the respondent-Railway failed to use reasonable foresight and care in the carriage of the suit consignment. Regarding the issue relating to the quantum of compensation payable to the claimant by the Railways, there was difference of opinion between the Judicial Member and the Technical Member. While the judicial member, accepting the contention of the claimant that the entire consignment was damaged and it was not fit for human consumption and the same was sold as cattle feed, came to the conclusion that the value of the consignment would come to Rs.3,61,270.80 and after adjusting the sum of Rs.73,144/- realised by the claimant by selling the consignment as cattle feed under Exs.A-17 to A-19 to mitigate the loss, the total loss, the applicant sustained would be Rs.2,88,127/- and accordingly held that the claimant is entitled for the compensation of Rs.2,88,127/-.

5. The technical member, though agreed with the findings on issue Nos.1 and 2, disagreed with the judicial member on issue no.3 regarding the quantum of damages payable to the claimant and held that it would be fair to award compensation based on the assessment made in the joint survey report only and accordingly held that the applicant is entitled to receive only a sum of Rs.1,45,714/- as damages.

6. Since there was difference of opinion between the judicial member and the technical member the matter was referred to a third member, viz., Shri.V.N.Kulkarni, Member (Judicial) at RCT/Bangalore. The third member agreed with the findings of the technical member and therefore the claimant was awarded only a compensation of Rs.1,45,714/-. Being aggrieved by that the above CMA has been filed.

7. Heard both.

8. The learned counsel for the claimant/appellant submitted that the technical member and the third member have not properly considered the oral and documentary evidence adduced before the tribunal and they have erred in holding that the private survey of the consignment cannot be accepted. The learned counsel for the claimant/appellant submitted that the Assistant Commercial Manager (hereinafter referred to as "ACM") conducted only a visual test and in spite of specific request made by the claimant by its letter Ex.A-6 dated 15.04.1997 to survey the goods as per the provisions contained in the Railway Act and sought for physical and chemical analysis of the goods the respondent neither rejected the request by sending a reply nor arranged for conducting physical or chemical analysis and therefore the claimant arranged for a private survey. The learned counsel further submitted that though the claimant has referred to Ex.A-12-Survey Report and Exs.A-13 and A-14-Analysis Certificates extensively in the claim petition, the correctness of the same has not been questioned in the reply statement filed by the respondent. The taking of samples by the private surveyor has also not been disputed in the reply statement. The learned counsel further submitted that

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though A.W.2-the private surveyor has been examined, he has not been cross examined by the respondent with respect to Exs.A-12 to A-14 and no question whatsoever has been put to him regarding the correctness and trust-worthiness of Exs.A-12 to A-14 and therefore submitted that the technical member and the third member erred in not taking into consideration Exs.A-12 to A-14.

9. The learned counsel for the claimant/appellant further submitted that in Ex.A-13-analysis certificate it is clearly stated that the samples were found to be wet and in Ex.A-14-analysis certificate it is clearly stated that the samples were found to be discoloured and in Ex.A-12 it is clearly stated that the goods are unfit for human consumption. The learned counsel for the claimant/appellant further submitted that the technical member and the third member are not correct in observing that the samples sent for analysis cannot be said to be representative samples, as A.W.2 has not been cross examined on this aspect. He further submitted that when admittedly the goods were delivered after a long delay of 8 months and 10 days; 150 bags were found to be damaged to the extent of 95%, 69 bags to the extent of 90% and the assessment of damage in respect of 276 bags at 15% that too on the basis of the visual examination could not be accepted. He further submitted that when all the three members have unanimously held that the respondent-Railway failed to use reasonable foresight and care in the carriage of the consignment and when 50% of the consignment had suffered damage at 95% and 90% the claim of the Railway that 276 bags had suffered only 15% damage is not acceptable.

10. Per contra, the learned counsel for the respondent-Railway submitted that at the request of the consignee/appellant herein, open delivery was given after conducting the joint survey as evidenced by Ex.A-8 and Ex.A-8 and has been signed both by the representatives of the Railway as well as the claimant. But no protest has been made by the consignee in respect of the damage assessed at 15%. The learned counsel further submitted that as per Rule 4 of Manner of Giving Open Delivery and Prescription of Partial Delivery Certificate Form Rules, 1990 (hereinafter referred to as "the Rules"), the extent of damage to the consignment shall be assessed by the Railway servant granting open delivery on the basis of visual examination and such other chemical or physical tests as may be necessary and as such discretion vests entirely on the Railway servant granting such open delivery to decide as to whether chemical or physical test is necessary to assess the extent of damage to the consignments. He further submitted that simply because the consignee has requested for physical and chemical analysis, it is not incumbent on the Railways to accede to the request, unless the Railway Servant granting the open delivery is satisfied that there is a need for the same. The learned counsel further submitted that the technical member has pointed out that though the first lot of 189 kattas covered by Ex.A-17 was disposed on 23.04.1997, the sample is said to have been taken on 24.04.1997 and as such the sample cannot be said to be representative in character.

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11. As rightly pointed out by the judicial member, if the consignee is not satisfied with the assessment of damage, it is open to him to get the consignment examined by a private surveyor. Admittedly, under Ex.A-6, the consignee had called upon the Railways to arrange for physical and chemical analysis of the damaged goods. But there was no reply for the same either rejecting the request or accepting the same. When the specific request made by the consignee had neither been rejected nor accepted, it is but reasonable on the part of the consignee to arrange for a private survey and accordingly a private survey had been arranged. The private surveyor had taken samples on 24.04.1997 at the godown of the consignee and the samples were sent for analysis; the survey report has been marked as Ex.A-12; the analysis certificates have been marked as Exs.A-13 and A-14 and the private surveyor has been examined as A.W.2.

12. As submitted by the learned counsel, the appellant/consignee, in the claim statement, has extensively referred to the report of the private surveyor as well as the analysis reports. But the Railways in the reply statement has not chosen to question the correctness and trust-worthiness of Exs.A-12 to A-14. Further, A.W.2 has not been cross examined regarding the correctness and trust worthiness of Exs.A-12 to A-14. Further, A.W.2 has not been questioned regarding the manner in which the samples were taken or about the representative nature of the samples taken by the surveyor. In the absence of pleadings as pointed out above and in the absence of cross examination of A.W.2, as rightly pointed out by the judicial member, there was no impediment to rely upon Exs.A-12 to A-14.

13. The judicial member has extensively dealt with the documents and has clearly pointed out that as per Ex.A-12, A-13 and A-14 the two samples sent for analysis were found to be affected by yeast/molds and made them poisonous and unfit for human consumption. The judicial member has also rightly pointed out that the damage assessed to 276 bags under the joint survey report Ex.B-3 by the SCM/Salt Cotaurs as incorrect when 219 bags were found to be fully damaged, discoloured and affected by insects and found wet/water soaked and fungus grown and lumpy and the ACM himself assessed the damage with respect to 150 bags at 95% and 69 bags at 90% and damage to 219 bags were assessed at 15% only. Therefore, this Court is of the considered view that the findings of the judicial member cannot be faulted with.

14. Now coming to the findings recorded by the technical member, it has to be pointed out that the findings are mainly based on the discrepancies pointed out in the deposition of A.W.1. A.W.1 has deposed that he did not agree for the assessment of damage at 15% in respect of 276 bags and however the ACM informed him that he has no power to assess at higher percentage and asked him to remove the goods first and in his re-examination, he has deposed that though he raised protest for assessment of damage to 276 bags of Peas at 15% at the time of joint survey, he was not

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allowed to record the same in the joint survey report-Ex.A-8, by stating that if he records it, the delivery will not be effected. This part of the deposition of A.W.1 has been commented upon by the technical member and has observed that A.W.1 is not telling the truth. The technical member has observed that A.W.1 was changing the version that he was not permitted to protest regarding the assessment. The technical member has observed that even before drawing of samples a part of the consignment appears to have been disposed of vide Ex.A-17 and on the basis of such an observation, the technical member held that the result of the private survey cannot be considered as representing the correct position and therefore disagreed with the findings of the judicial member and agreed with the damage fixed at 15% in respect of 276 bags of consignment and fixed the damages at Rs.1,45,714/-. It is pertinent to point out that the technical member has not at all adverted to other aspects which were taken into consideration by the judicial member.

15. It is pertinent to point out that the technical member has relied upon two decisions rendered in TAI/14/93 and TAI/370/93 by the Railway Claims Tribunal, Delhi Bench, but those cases relate to re-weighment done in the absence of representatives of the Railways. The ratio laid down therein is not applicable to the facts of this case.

16. The third member to whom the dispute was referred to in respect of the amount of compensation payable agreed with the findings of the technical member. For agreeing with the findings of the technical member, the third member adopted the same reasonings of the technical member. The third member has observed that it is difficult to hold, based on the data available, that the samples pertaining to the specific consignment are representative of the condition and depicted the position at the time of receipt of the consignment. The third member has observed that the applicant has not adduced any clear-cut or cogent evidence to establish that the consignment was completely damaged and further observed that the joint survey report is binding on both sides. Therefore, as rightly contended by the learned counsel for the appellant, the third member has also not considered the evidence on record independently.

17. Admittedly in this case the Railway servant who gave the open delivery assessed the extent of the damage to the consignment only on the basis of visual test and though the damage to 150 bags was assessed at 95% and 69 bags was assessed at 90%, the Railway servant has not chosen to take samples and send the same for chemical analysis especially when the consignment has arrived after a delay of 8 months and 10 days. The Railways atleast on the request made by the claimant ought to have sent the samples for chemical analysis. The contention of the learned counsel for the Railways based on Rule-4 is unsustainable. The discretion vested with the Railway servant who gave open delivery is not absolute, but the discretion should be exercised in a judicious manner. As pointed out above, when 50% of the consignment, even

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according to the Railways, was damaged to an extent of 95%, the Railways ought to have sent the samples for chemical analysis to correctly assess the extent of damage to the remaining quantity. No reason whatsoever has been given by the Railways for not acceding to the request made by the claimant in this regard. The learned counsel for the appellant places reliance on the observation of a learned Judge of this Court, made in the order dated 17.05.2006 passed in C.M.A.No.416 of 1999. In the said order, the Learned Judge has observed as follows:

> "Basing on this, the appellant company, even in the event of not being satisfied with the assessment of damages done by the railway administration, can always go for an alternative method of assessment of damages like assessment by Chamber of Commerce or independent surveyors or even assessment by a local Panchayat. Instead of all these things, the appellant in this case has refused to take delivery of the goods."

18. If the request of the claimant calling upon the Railways to send the samples for chemical analysis is considered in the light of the above observation made by the Learned Judge, it could be easily held that the inaction on the part of the Railways in not sending any reply to the claimant's notice-Ex.A-6, dated 15.04.1997 and its failure to send the samples for chemical analysis are unjustified. When the Railways has not chosen to send the samples for chemical analysis, it is always open to the claimant to send the same for chemical analysis. When the claimant has extensively dealt with the contents of Ex.A-12 to A-14 in the claim statement the Railways has not chosen to repudiate the same or dispute its correctness or trust-worthiness in its reply statement. Further as pointed out above A.W.2-the private surveyor has not been questioned with respect to Exs.A-12 to A-14. These aspects have been completely overlooked by the technical member as well as by the third member. Simply because, it is stated in Ex.A-17 that a part of the consignment was sold on 23.04.1997, it could not be assumed that the consignment sold under Ex.A-17 was removed from the godown of the claimant especially when no questions were put to A.W.1. in that regard.

18. Therefore, this Court is of the considered view that the reasonings recorded by the judicial member are based on oral and documentary evidence available on record, whereas the findings of the technical member and the third member are not based on evidence on record. Therefore, for the reasons stated above, the appeal has to succeed and accordingly the appeal is allowed. However, there will be no order as to costs.

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Sub Asst.Registrar

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To

1. The Railway Claims Tribunal,
   Chennai Bench, Chennai.

2. The Record Keeper,
   VR Section,
   High Court, Madras.

1 cc to Mr.R.Thirugnanam, Advocate, SR.37492
1 cc to Mr.V.G.Suresh Kumar, Advocate, SR.37633

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